Supreme Court, U.S.
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No. 02-705

In the Supreme Court of the United States

CARGILL, INCORPORATED,

Petitioner,

v.

A&W BOTTLING, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A. The Circuits Are In Conflict On The Meaning Of *Matsushita*'s Rule

1. Whatever this Court actually meant by its decision in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) – a point that we discuss below – the courts of appeals plainly are in conflict on what rule to draw from that decision. In arguing to the contrary, respondents draw copiously from the Handbook of Boilerplate Briefs in Opposition, repeatedly reciting the mantra that every conflicting decision cited in the petition is "fact-specific" and "unique." And respondents certainly are correct in suggesting that the facts of each case we cite differ in some respects from the facts of the other cases; after all, some conspiracies were alleged to have begun on Tuesdays, while others were said to have been hatched on Wednesdays. There can be no doubt, however, that those factual differences are wholly immaterial to the issue here and that the Seventh Circuit applies a *rule* to the facts that departs in significant ways from the rule applied by other courts of appeals.

The Court need not take our word for this: neutral, knowledgeable commentators unequivocally agree that the conflict between the Seventh Circuit's approach and that of other courts is manifest and important. Professor Hovenkamp, for example, notes that "many courts have read *Matsushita* as requiring a certain quantum of verbal agreement before summary judgment can be avoided," but that the decision below "parts company with [the] numerous circuit decisions that continue to impose high evidentiary requirements even in 'plausible offense' situations." Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 925, 926 (2003). Among the decisions of other courts imposing these high evidentiary requirements, Prof. Hovenkamp lists *Blomkest Fertilizer, Inc.* v. *Potash Corp. of Saskatchewan*, 203 F.3d

1028, 1036 (8th Cir. 2000) (en banc), and *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999) – both of which are discussed in the petition. See 116 HARV. L. REV. at 926 n.37. In contrast, Prof. Hovenkamp explains that, "[u]nder [the Seventh Circuit's] approach, once one determines that the market is conducive to collusion and has some of the suspicious practices that suggest collusion, little or nothing in the way of 'explicit' evidence of collusion is required." *Id.* at 926. For this proposition, Prof. Hovenkamp cites the decision below. *Id.* at 926 n.38 (also citing *JTC Petroleum Co.* v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999)).

Similarly, another commentator recently explained that, under the rule of the Seventh Circuit's decision in this case,

> where the court's review of the economic evidence indicates that an illegal conspiracy * * * would make economic sense, almost any shred of evidence providing support for such a conspiracy appears sufficient to send the case to the jury. In this respect, the decision stands at odds with the insistence of most other courts – drawing on an aspect of *Matsushita* that the *HFCS* [*i.e.*, High Fructose Corn Syrup] court did not discuss – that plaintiffs supply evidence of a special character, of the sort that "tends to exclude" the possibility that the defendants acted independently.

Meyer, *The Seventh Circuit's* High Fructose Corn Syrup *Decision—Sweet for Plaintiffs, Sticky for Defendants*, ANTITRUST, Fall 2002, at 67, 67.

This commentator added that "[t]he most striking feature of the *HFCS* decision was the court's divergence from the conventional articulation of the *Matsushita* standard for evaluating whether the plaintiffs' evidence of antitrust conspiracy is sufficient to avoid summary judgment." *Id.* at 69.

He concluded that the Seventh Circuit's treatment of noneconomic circumstantial evidence in the decision below

> *clearly differentiates the case from the vast majority of other decisions applying Matsushita.* Other courts confronting similar circumstances have routinely affirmed (or granted) summary judgment despite the plaintiffs' evidence of statements by alleged co-conspirators that could be interpreted as reflecting the existence of an unlawful conspiracy. [Citing *Blomkest*, *Baby Food*, and *In re Citric Acid Antitrust Litig.*, 191 F.3d 1090 (9th Cir. 1999).] * * * In these cases and others, courts applying *Matsushita*'s "tends to exclude" standard have consistently allowed defendants' "reasonable legitimate explanations" ([*Citric Acid*,] 191 F.3d at 1106) to trump the plausible interpretations favored by plaintiffs.
>
> The *HFCS* decision *turns this approach upside down* by allowing the plaintiff to avoid summary judgment with evidence only "one plausible" interpretation of which supports the plaintiffs' conspiracy hypothesis.

Id. at 69-70 (footnotes omitted; emphasis added).

2. Against the background of this commentary, it is not at all surprising that respondents' attempt to distinguish the conflicting decisions cited in the petition is without substance. Respondents assert, for example, that the evidence of conspiracy here is "far different and stronger" than it was in *Citric Acid*, noting that the admitted conspirators in *Citric Acid* "effectively exonerated Cargill." Br. in Opp. 17. This argument, however, is silly. The evidence of conspiracy was vastly stronger in *Citric Acid* – where there *were* conspirators who *admitted fixing prices* – than it is in this case, where there was no admitted conspiracy *at all*. Again, the Court need not take our word for it: the court below *itself* acknowledged that "[t]he evidence of the defendants' guilt is weaker in this case than in

the * * * citric acid conspiracy case[]." Pet. App. 22a. Yet the Ninth Circuit affirmed the grant of summary judgment to Cargill in *Citric Acid* while the Seventh Circuit reversed it here.

Similarly, respondents contend that the evidence of conspiracy in *Blomkest* (the "*Potash*" case) "was much weaker" than that here. Br. in Opp. 20. But that assertion also is much bolder than it is accurate. Here, extensive discovery concerning a supposed seven-year conspiracy has produced *a single, wholly ambiguous document* that constitutes the *entirety* of the circumstantial case against Cargill.[1] In *Blomkest*, by way of contrast, the plaintiffs offered very substantially *more* circumstantial evidence (much of which is ignored by respondents in their brief in opposition), each bit of which was at least as probative of conspiracy as the snippet produced by respondents here. See Hovenkamp, 116 HARV. L. REV. at 926 n.37 (noting evidence in *Blomkest* of "direct price verifications" between competitors and of "mutual apologies from one firm to another for stealing customers via price concessions"); *Blomkest*, 203 F.3d at 1033-1034, 1036; *id.* at 1044-1046, 1050

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[1] As we note in the petition (at 6 n.3, 11 & n.6), only one of the documents discussed by the court of appeals and cited by respondents was held admissible against Cargill. Because the Seventh Circuit did not disturb that evidentiary ruling and respondents do not now contend that the court should have done so, only that single document may be used to construct the case against Cargill – a point that respondents do not dispute. See also Meyer, ANTITRUST at 74 n.18 ("as to more than half of the eight [bits of evidence discussed by the court of appeals], the court of appeals' rationale for admissibility * * * would render the statement admissible against only one of the defendants"). In any event, the two or three remaining bits of evidence cited by respondents at Br. in Opp. 8-9 that relate to Cargill (which consist of obviously hearsay taped statements by an ADM official) also indicate nothing more than a recognition of pricing interdependence and are manifestly insufficient to defeat summary judgment under the standards applied by other courts of appeals.

(Gibson, J., dissenting) (noting numerous price verification calls between competitors, solicitations by companies of their competitors to restrict competition, and internal company notes referring to "cheating" by competitors). Yet the en banc Eighth Circuit affirmed the award of summary judgment to the defendants in *Blomkest* while the Seventh Circuit denied it here.

Respondents' tactic, of course, is to describe the factual background of each decision in numbing detail and then suggest that different outcomes can be explained by different records in different cases. But that simply is not so. As the commentary confirms, each of the decisions cited in the petition held that antitrust plaintiffs may *not* defeat summary judgment by pointing to economic evidence common to virtually all commodity industries – "follow-the-leader" pricing, business dealings between competitors, and so on – that is combined with circumstantial evidence that may reflect nothing more than awareness of lawful pricing interdependence. In the Seventh Circuit, in contrast, precisely the same ambiguous evidence allows plaintiffs to survive summary judgment and take their multi-billion-dollar cases to trial.

For that reason alone, review by this Court is warranted. And that is especially so because the conflict in the circuits involves a recurring issue of great practical importance. The decision below "creat[es] new risks for what has traditionally been regarded as lawful interdependent behavior among oligopolists." Meyer, ANTITRUST at 67. "The two factors that explain the court's decision – the evidence of 'noncompetitive' oligopolistic behavior and ambiguous statements by company employees – may well be commonplace in many concentrated industry settings," where "a high degree of interdependence is an inherent aspect of the competitive landscape." *Id.* at 70, 71. For businesses in such industries, the decision below "creates dangers that are very hard to deal with": "how are they to

avoid generating ambiguous statements that reflect the interdependence that characterizes the market structure in which they operate?" *Id.* at 73. And because the generation of such statements is unavoidable, "the court's decision comes very close to requiring a trial whenever plaintiffs offer evidence of oligopolistic interdependence." *Id.* at 70.

That reality both will encourage plaintiffs to "seek out [the Seventh Circuit] in order to improve their chances of getting past summary judgment" in national class actions (*id.* at 73) and will "embolden plaintiffs that are eager to find support for conspiracy in a handful of ambiguous statements culled from the massive paper and electronic files of corporate defendants." *Id.* at 67. The inevitable result will be speculative strike suits and coerced settlements paid by defendants that did nothing wrong. Intervention by this Court accordingly is imperative.

B. The Decision Below Misunderstood *Matsushita*

The conflict in the courts of appeals stems from the Seventh Circuit's misapplication of *Matsushita*. In *Matsushita* and *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the Court held that an antitrust plaintiff may not prevail by relying on "ambiguous" evidence. *Matsushita*, 475 U.S. at 588, 597 n.21; *Monsanto*, 465 U.S. at 763-764. Of course, respondents are correct when they say that there are degrees of ambiguity, that antitrust plaintiffs may rely on circumstantial evidence, and that the plaintiffs' circumstantial evidence need not be wholly unambiguous. Br. in Opp. 11-12. But this Court's decisions make clear that plaintiffs may *not* escape summary judgment by relying on evidence, of either a circumstantial or an economic nature, that is *just as consistent* with independent behavior as it is with conspiracy. That is what the Court meant when it held in both *Matsushita* and *Monsanto* that "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility'

that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764). See Pet. 16-17.[2]

This rule advances significant antitrust policies. As we note above, in industries characterized by interdependent pricing, ambiguous written and economic evidence that is consistent both with lawful conscious parallelism and with illegal collusion almost invariably will be present. If such evidence is sufficient to take a case to trial, legitimate and even procompetitive conduct will be discouraged. See Pet. 29 (citing *Matsushita* and *Monsanto*). Respondents deny that is so (see Br. in Opp. 12-13 n.8), but the danger is plainly visible in this case. Here, petitioners *cut* prices to large customers and *expanded* production capacity during the course of the alleged conspiracy. See Pet. 9, 25-26. Yet that desirable and seemingly procompetitive activity was taken by the court of appeals to be suggestive of conspiracy because the court was able to imagine ways in which price-cutting and capacity expansion may be *consistent* with collusion. Pet. App. 8a, 9a. This sort of analysis

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[2] Respondents are wrong in asserting that we "insist that each item of evidence be examined individually in isolation." Br. in Opp. 13. In fact, we agree with the courts' recognition that they must examine the totality of the evidence. See, *e.g.*, *Citric Acid*, 191 F.3d at 1105-1106. Where the court below and respondents go wrong, however, is in reasoning that *unrelated* bits of ambiguous evidence – no one of which is probative in itself – somehow can be combined into a probative whole. See Pet. App. 16a. As then-District Judge Becker wrote in holding the "mountain of 'evidence'" offered by the plaintiffs insufficient to defeat summary judgment in *Matsushita*, "[n]othing plus nothing times nothing still equals nothing." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1311 (E.D. Pa. 1981), aff'd in part and rev'd in part, 723 F.2d 238 (3d Cir. 1983), rev'd, 475 U.S. 574 (1986). Yet the decision below "establishes that zero plus zero is not always zero in the Seventh Circuit." Meyer, ANTITRUST at 72.

is positively Kafkaesque: a *failure to increase* capacity surely would be said to evidence conspiracy because it would be anticompetitive, but a decision *to increase* capacity also is said to evidence conspiracy because it may be exclusionary. The prospect of such a whipsawing of defendants demonstrates the wisdom of the "tends to exclude" requirement.

In arguing to the contrary, respondents assert that this Court did not really mean anything by its use of the "tends to exclude" formulation (see Br. in Opp. 4, 10) – notwithstanding the appearance of that language in both *Matsushita* and *Monsanto*. In support of this contention, respondents observe (*id.* at 4) that, after stating the requirement that plaintiffs present evidence tending to exclude the possibility of independent action, the Court in *Matsushita* elaborated on the standard by stating: "in other words, [plaintiffs] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiffs]." 475 U.S. at 588. But in stating that this "alternative formulation" of the standard somehow detracts from the rule limiting the antitrust inferences that may be drawn from ambiguous evidence, respondents get matters backwards; the "tends to exclude" requirement surely was intended to shed light on the circumstances where it would be reasonable for a jury to conclude that the "competing inferences" do favor collusion.[3]

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[3] As respondents note, the court of appeals did cite *Matsushita* for the somewhat dizzying proposition that plaintiffs "must present evidence that would enable a reasonable jury to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so." Br. in Opp. 2 (quoting Pet. App. 15a). But even that statement subtly distorts this Court's analysis. After describing the requirement that plaintiffs present evidence tending to exclude the possibility of independent action, this Court indicated that the inference of conspiracy must be reasonable "*in light of the competing*

That is why "the phrase that other courts have treated as the central meaning of *Matsushita*" is "the requirement that the evidence must 'tend to exclude the possibility' that the defendants acted independently" (Meyer, ANTITRUST at 69), and it is why commentators also have identified the "tends to exclude" test as "*Matsushita*'s pivotal phrase." *Id.* at 68. To be sure, "the court of appeals need not have articulated the *Matsushita* standard in order to have applied it." *Id.* at 69. For reasons we already have explained, however, the decision below "appears not merely to have lowered the bar for avoiding summary judgment but to have altered or eliminated the basic *Matsushita* test when oligopolistic interdependence is present." *Id.* at 72.[4]

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inferences of independent action or collusive action that could not have harmed [the plaintiffs]." 475 U.S. at 588 (emphasis added). That formulation plainly has it in mind that evidence that is as consistent with independent action as with conspiracy does not suffice to defeat summary judgment. See II P. AREEDA ET AL., ANTITRUST LAW (2d ed. 2000) ¶ 308, at 98 ("if the proffered evidence is equally consistent with competition and collusion, then no fact issue of collusion is established"). In contrast, the Seventh Circuit nowhere indicated that a reasonable jury would have to reject the inference of conspiracy if the evidence was ambiguous – and the court of appeals' treatment of the evidence makes clear its view that a jury *may* find collusion in such circumstances.

[4] In saying this, we do not suggest, as respondents would have it (at Br. in Opp. 14), that the author of the decision below willfully disregarded this Court's holdings. As we indicated in the petition, however, that judge has characterized the crucial language of *Matsushita* as dictum. See Pet. 17. Moreover, as Prof. Hovenkamp has noted, the conclusion below "would be inconsistent with *Matsushita* unless one attaches significant weight to the underlying plausibility of the claim." Hovenkamp, 116 HARV. L. REV. at 926 n.38.

The proof of the pudding here lies in the outcome below. In the Ninth Circuit, as we have shown, an antitrust plaintiff may not get to trial by proffering evidence of interdependent behavior along with a handful of ambiguous documents. The same thing is true in the Third Circuit, and in the Eighth. In the Seventh Circuit, however, plaintiffs with just that sort of evidence *may* force the defendants to roll the dice in a trial where the trebled damages may run into the billions of dollars. Because the rule of *Matsushita* was intended to keep such insubstantial and speculative actions from going forward, review of the decision below is warranted.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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